United States v. Ferguson: The Sixth Circuit Adds a Third Test for Pretextual Police Conduct

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I. INTRODUCTION

For more than two centuries, the Fourth Amendment[1] has stood as a critical bulwark against the ability of the state to interfere in the lives and the property rights of ordinary citizens. At its most basic level, it protects the people from searches or seizures that are born out of hunch, harassment, hatred, and other improper bases. Instead, before a search may be undertaken or a seizure effected, the state actor involved (most often a police officer) must have either a judicially issued warrant or a particular quantum of belief or suspicion.[2]

Though the Supreme Court has woven an impressive and reasonably comprehensive fabric of Fourth Amendment jurisprudence,[3] it has never resolved the constitutionality of pretextual Fourth Amendment actions. For the purposes of this Comment, pretextual conduct is that in which a police

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[1] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

[2] The causal bases which police must have in order to carry out a search or seizure are probable cause and reasonable suspicion. For purposes of this Comment, the following definition of probable cause (the strictest Fourth Amendment standard) is sufficient: "A reasonable ground for belief in certain alleged facts. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990). For a definition of reasonable suspicion, the intermediate causal basis, see *infra* note 11. In a third category (with the lowest level of scrutiny) are searches and seizures that need only be effected pursuant to a standard of general reasonableness. *See, e.g.*, cases discussed *infra* note 145.

[3] Note that this is not a view that is universally shared. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

officer makes a stop, arrest, or search, based on a constitutionally proper level of belief or suspicion with respect to offense *A*, when he or she is in fact interested in the individual's possible connection to a separate offense *B*, for which he or she lacks a constitutionally acceptable level of belief or suspicion.[4]

It appeared in 1985 that the Supreme Court would finally resolve the pretext question, when certiorari was granted in *State v. Blair*.[5] However, after hearing oral arguments in the case, the Supreme Court dismissed the writ of certiorari as improvidently granted.[6]

That unexplained move has left federal and state courts to continue to develop their own pretext rules. Even before the U.S. Court of Appeals for the Sixth Circuit handed down its decision in *United States v. Ferguson*[7] in November of 1993, there was a split among the federal circuit courts as to

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[4] Compare the definition used by the district court in *United States v. Ferguson* and restated by the Sixth Circuit: "[A] pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place in connection with an unrelated crime as to which they lack reasonable suspicion." United States v. Ferguson, 8 F.3d 385, 387 (6th Cir. 1993) (en banc). *Accord* United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988).

In *Guzman*, the court noted:

> A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. The classic example, presented in this case, occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity.

Id.

[5] 691 S.W.2d 259 (Mo. 1985) (en banc), *cert. granted sub nom.* Missouri v. Blair, 474 U.S. 1049 (1986), *cert. dismissed as improvidently granted*, 480 U.S. 698 (1987).

[6] Missouri v. Blair, 480 U.S. 698 (1987). The certiorari dismissal was made without comment, leaving scholars to speculate on the Court's reason(s) for doing so. One author has suggested that the Court did so because "the Missouri trial court made a factual finding that the defendant was not arrested for the traffic violation, but was illegally detained as part of a homicide investigation. Thus, without an arrest, the Court could not reach the pretext issue." *See* Daniel S. Jonas, Comment, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791, 1791 n.4 (1989) (citation omitted).

[7] 8 F.3d 385 (6th Cir. 1993) (en banc).

the test by which allegedly pretextual police conduct should be measured.[8] The *Ferguson* decision enacts yet a third test, adding further confusion and inconsistency to the area.

What makes the Supreme Court's silence on the pretext question so unusual is the extraordinary potential for the intrusive and arbitrary police action that has long been the axis around which Fourth Amendment jurisprudence has revolved. If the police are allowed to take action against citizens on a mere pretext, then they can effectively make an end-run around the carefully crafted framework of probable cause and reasonable suspicion[9] that the Supreme Court has constructed. Particularly in the motor-vehicle context, the myriad of petty offenses codified[10] and so available to police for use as a pretext means that virtually anyone can be subjected to the indignity and fear of an encounter with police investigating a serious crime based on nothing more than a police hunch and a failure to signal when changing lanes.

This Comment begins by examining the pretext test adopted by the Sixth Circuit in *Ferguson* and noting how it differs from the tests used by other circuits. It then reviews the trio of Supreme Court cases that has served as the basis for the *Ferguson* decision and the other circuits' pretext rules. This Comment argues that the *Ferguson* court, as well as all but two of the other circuits, have misunderstood the doctrinal direction of the Supreme Court's pretext jurisprudence, and that the dangers of pretextual police conduct demand a much firmer response than that employed by the Sixth Circuit in *Ferguson*. The Comment concludes by arguing that the Tenth and Eleventh Circuits have identified the proper objective constitutional test for pretextual police action: that the Fourth Amendment prohibition of unreasonable seizures is violated if the police *would* not have stopped a car for a motor-vehicle violation absent an intuition, not supported by facts amounting to the constitutionally required reasonable suspicion or probable cause, that the individual stopped is involved in some sort of other, more serious criminal wrongdoing.

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[8] The split that existed prior to the *Ferguson* decision was between the "would" and "could" tests, which are discussed in Part II.A of this Comment. The *Ferguson* test is discussed in detail *infra* at Part II.B.

[9] See *supra* note 2 for definitions of these terms.

[10] *See, e.g.*, OHIO REV. CODE ANN. §§ 4511.25, 4511.33 (Baldwin 1993) (remaining within lane markings); *id.* § 4511.34 (space between moving vehicles); *id.* § 4511.39 (use of turn signals when changing lanes); *id.* § 4511.43 (coming to a complete stop at "Stop" signs); *id.* § 4511.70 (maintaining clear rear and side rear windows); *id.* § 4513.05 (maintenance of rear license plate bulbs).

Though the pretext problem presents itself in a variety of Fourth Amendment contexts, including pretext searches and pretext arrests, this Comment focuses principally on the problems presented by pretextual stops of motor vehicles under *Terry v. Ohio*.[11]

II. TREATMENT OF PRETEXT POLICE ACTION BY THE FEDERAL CIRCUIT COURTS

The question of when a police officer can constitutionally stop a motorist has sparked a sharp division between the federal circuit courts. All but two of the circuits which have weighed the issue have determined that a *Terry*-style investigative stop of a motor vehicle satisfies the Fourth Amendment's proscription of unreasonable seizures if the officer *could* have stopped the vehicle for a traffic infraction. As such, this test places only a minimal limit on police discretion: the jurisdiction's motor vehicle operation statute, usually a highly detailed regulatory code that, if enforced rigidly, would eventually snare even the most punctilious, perfectionist driver. The officer's subjective motivation is ignored, as is the possibility that the stop was made based on discriminatory animus.

The "would" test, by contrast, establishes a modest judicial check on police, by imposing a "believability" standard: While an officer may profess to have been concerned for traffic safety, do the circumstances, or, for example, local citation-writing statistics, suggest that the stop *would* not have taken place if the driver were not in an unusual place at an unusual time, or of the wrong racial or ethnic background, or already under observation for some much graver offense? The "would" test also proclaims, at least by implication, that the motor vehicle statutes should not be the means to the end of, say, narcotics law enforcement, but an end in themselves. Such a measure does not require the court to endlessly

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[11] 392 U.S. 1 (1968). The defendant in *Terry* was stopped (along with two accomplices) and frisked by a plainclothes police officer who had observed a series of unusual actions that led him to suspect that the trio was planning a robbery of a particular store. *Id.* at 5–7. The Supreme Court sustained as constitutional the brief, investigative, on-the-street stop for questioning and a subsequent frisk for weapons despite the absence of probable cause for the seizure and search. *Id.* at 30–31. The *Terry* standard, which has come to be known as the "reasonable suspicion" requirement, was applied for the first time in the motor-vehicle context in United States v. Brignoni-Ponce, 422 U.S. 873 (1975): "[W]e hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain [illegal aliens], he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.* at 881.

probe the minds of police officers, or act as a "Monday morning quarterback," but rather provides an objective standard by which to check police conduct that takes place at the outer reaches of credibility.

A. *The Pretext Doctrine of the Federal Circuit Courts Other than the Sixth Circuit*

1. *The "Could" Test*

a. *The Seventh Circuit's Approach*

United States v. Trigg[12] presents perhaps the most thorough and scholarly treatment of the pretext question at the federal circuit court level. In that case, a team of narcotics officers of the Allen County, Indiana, police force began surveillance of an automobile that had earlier been observed in front of a known crack house.[13] Though it was "undisputed . . . that the officers lacked probable cause to believe that Trigg was engaged in narcotics activity,"[14] the police following Trigg's car stopped it once a headquarters records check uncovered that Trigg's license had been suspended; the stop led to an arrest on the traffic charge, followed by a search that revealed fifty-three grams of cocaine in Trigg's coat pocket.[15] The Seventh Circuit ignored an extraordinary show of force by the Allen County police and the possible subjective motivations of the officers,[16] and distilled the test for pretextual conduct to a simple "objective" application of the probable cause requirement to the traffic offense: "[S]o long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional."[17] That Trigg's earlier appearance at the crack house may have been the

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[12] 878 F.2d 1037 (7th Cir. 1989), *cert. denied*, 112 S. Ct. 428 (1991).

[13] *Id.* at 1038.

[14] *Id.*

[15] *Id.*

[16] The district court, alarmed by the unusual scene of six narcotics officers teaming up to make an arrest on a minor traffic offense, had ruled that the traffic arrest was just a pretext to search for drugs, which it found to be prohibited by the Fourth Amendment. *Id.*

[17] *Id.* at 1041. Note that while the Seventh Circuit considers this a pretextual arrest case, even though it began with a traffic stop, its holding is nonetheless useful as an example of the "could" test.

primary—subjective—motivation of the arresting officers was deemed inconsequential by the Seventh Circuit.[18]

b. *The Fifth Circuit's Approach*

Among the cases cited in *Trigg* was *United States v. Causey*,[19] a pretext arrest case handed down by the Fifth Circuit sitting en banc. Acting on an anonymous tip about a bank robbery suspect, a tip which by their own admission fell short of the probable cause required to make an arrest, the police unearthed and executed a years-old misdemeanor arrest warrant for failure to appear in court.[20] The court's language in rejecting a subjective intent approach to the police conduct was very similar to that of the *Trigg* court: "The correct rule is that . . . in a case where the officers have taken no action except what the law objectively allows their subjective motives in doing so are not even relevant to the suppression inquiry. . . . [T]he intent with which they acted is of no consequence."[21]

c. *The Eighth Circuit's Approach*

The Eighth Circuit cited approvingly to both *Trigg* and *Causey* in its opinion in *United States v. Cummins*,[22] a case that involved exactly the sort of traffic stop at issue in *Ferguson*.[23] While acknowledging that a prior decision of the Circuit "ha[d] declared in dictum 'that pretextual stops are unreasonable under the fourth amendment,'"[24] the *Cummins* court nonetheless adopted the "could" test for pretextual activity, holding that "the stop remains valid even if the officer would have ignored the traffic

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[18] *See id.* at 1040 ("Recent Supreme Court decisions, however, cast substantial doubt upon the continuing validity of the subjective intent approach. In a trilogy of cases, the Court has stressed that fourth amendment analysis ordinarily involves 'an objective assessment of the officer's actions . . . .'"). This trilogy is discussed in detail *infra* at Part III, and criticized *infra* at Part IV.

[19] 834 F.2d 1179 (5th Cir. 1987) (en banc).

[20] *Id.* at 1180. At the trial, one of the officers acknowledged that the police had no interest in the old nonappearance charge; their exclusive interest was Causey's possible involvement in the bank heist, an interest fulfilled when Causey subsequently confessed. *Id.*

[21] *Id.* at 1184–85.

[22] 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 429 (1991).

[23] United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993) (en banc).

[24] *Cummins*, 920 F.2d at 501 (quoting United States v. Portwood, 857 F.2d 1221, 1223 (8th Cir. 1988), *cert. denied*, 490 U.S. 1069 (1989)).

violation but for his other suspicions [about the individual's possible involvement in more serious criminal activity for which an adequate causal basis is lacking]."[25] As in *Ferguson*, the police officer in *Cummins* began to follow the car because its occupants were behaving strangely.[26] The officer stopped the car when the driver (Cummins) failed to signal when making a right turn.[27] Notably, the officer testified at the suppression hearing[28] that he "probably would not have stopped [Cummins] for the traffic violation if the defendants had not behaved so suspiciously."[29] This testimony passed without comment from the court.

d. *The Third Circuit's Approach*

The Third Circuit's decision in *United States v. Hawkins*[30] was cited by the Sixth Circuit in *Ferguson*[31] and has been cited by others as a case enacting the "could" standard for judging pretextual police activity, though *Hawkins* in fact avoided the pretext issue.[32] But the panel's critical comments about the "would" test adopted by the Eleventh Circuit,[33] combined with its dictum that "the fact that a pretext was given [*i.e.*, that the police officer testified that he stopped the vehicle for a series of traffic offenses] does not render invalid an otherwise constitutional search,"[34]

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[25] *Id.*; *cf. id.* ("We reject the argument . . . that the applicable test is 'not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.'") (quoting the Eleventh Circuit's holding in United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986)).

[26] *Cummins*, 920 F.2d at 499.

[27] *Id.*

[28] A suppression hearing is "[a] pretrial proceeding in criminal cases in which a defendant seeks to prevent the introduction of evidence alleged to have been seized illegally. The ruling of the court then prevails at the trial." BLACK'S LAW DICTIONARY 1440 (6th ed. 1990).

[29] *Cummins*, 920 F.2d at 500.

[30] 811 F.2d 210 (3d Cir. 1987), *cert. denied*, 484 U.S. 833 (1987).

[31] United States v. Ferguson, 8 F.3d 385, 389 (6th Cir. 1993) (en banc).

[32] Because the court "agree[d] with the district court that there was sufficient basis to raise a reasonable suspicion that the occupants of the car . . . were engaged in the sale and purchase of narcotics," *Hawkins*, 811 F.2d at 213, it found it "unnecessary . . . to consider whether the officers' observations of a traffic violation would alone have justified the stop," *id.* at 213 n.4. This, of course, is exactly the opposite of what the Sixth Circuit did.

[33] *See id.* at 215.

[34] *Id.*

have led some—or at least the Sixth Circuit—to conclude that the Third Circuit is aligned with the Fifth, Seventh, and Eighth Circuits on the pretext question.[35]

e. *The Approaches of the Second, D.C., and Fourth Circuits*

The Second Circuit aligned itself with the other circuit courts adopting the "could" standard in *United States v. Scopo*.[36] The police who stopped Scopo's vehicle were already following him as part of an investigation into an internecine Mafia conflict which had already claimed several lives.[37] Scopo's car was stopped for changing lanes without signalling, a stop that ultimately led to the discovery of an illegal handgun.[38] Although the court used "probable cause" and "reasonable suspicion" interchangeably, and did not appear to distinguish between pretextual stops and pretextual arrests,[39] the ultimate effect of its holding is unmistakably clear: a stop is constitutional as long as the officer could have stopped the car for a traffic violation.[40]

While the D.C. Circuit's *United States v. Mitchell*[41] opinion does not take notice of the distinction between the "could" and "would" tests of pretextual conduct, it appears to come down on the side of the "could" test.[42] The Fourth Circuit's decision in *United States v. Hassan El*[43] does make mention of the "would/could" dichotomy, "adopt[ing] the objective test and . . . hold[ing] that when an officer observes a traffic offense or

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[35] Note that the Fourth Circuit in 1992 heard a case challenging the constitutionality of a purportedly pretextual stop. After reviewing both the "could" and the "would" tests, United States v. Rusher, 966 F.2d 868, 875–76 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 351 (1992), however, the court concluded that "[a]pplying either test to the facts of this case would yield the same result, so we reserve the choice between the two for another day," *id.* at 876.

[36] 19 F.3d 777 (2d Cir. 1994).

[37] *Id.* at 779.

[38] *Id.* at 780.

[39] *See id.* at 781–85.

[40] *See id.* at 784. In fact, the Sixth Circuit's *United States v. Ferguson* decision is the case most relied upon by the *Scopo* court. *See id.*

[41] 951 F.2d 1291 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1976 (1992).

[42] *See id.* at 1295 (citing to the Eighth Circuit's *United States v. Cummins* ruling and commenting that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws").

[43] 5 F.3d 726 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1347 (1994).

other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment."[44]

2. *The "Would" Test*

Even before the Sixth Circuit's adoption of a third test for pretextual police activity in *United States v. Ferguson*,[45] the federal circuit courts were already split over the proper method for evaluating claims of pretext, and had been so split since the Eleventh Circuit's 1986 ruling in *United States v. Smith*.[46]

According to the testimony of the Florida Highway Patrol officer who made the stop challenged in *Smith*, he began following Smith's car because its occupants fit a drug-courier profile.[47] The officer testified that the driver appeared to be "weaving,"[48] though the Eleventh Circuit seemed skeptical of the trooper's veracity, observing that the car drifted outside its lane only once, and then by a mere six inches.[49] The officer, believing he had the requisite reasonable suspicion to justify an investigative stop for drug trafficking, pulled the car over and, eventually, discovered a kilo of cocaine.[50] The Eleventh Circuit first tested the officer's claim that the defendants matched his drug-courier profile, concluding that the officer's observations fell short of providing reasonable suspicion of drug trafficking.[51] Moving on to the question of whether the driver's "weaving" might have provided adequate justification for the stop, the court articulated the test for pretextual conduct in a way that put it squarely at odds with the several circuits that would later adopt the "could" test:

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[44] *Id.* at 730. The opinion explicitly eschews the Tenth and Eleventh Circuits' "would" test. *See id.* at 729–31.

[45] 8 F.3d 385 (6th Cir. 1993) (en banc).

[46] 799 F.2d 704 (11th Cir. 1986).

[47] *Id.* at 705–06. The factors which made up the officer's drug-courier profile apparently included the following: that the vehicle was traveling northbound on Interstate 95 at 50 miles per hour at 3:00 a.m., that it was occupied by two men in their 30s, that the vehicle bore out-of-state plates, that the driver was operating in an "overly cautious" manner, and that the driver did not look toward the police cruiser, which was apparently clearly visible in the median. *Id.* at 706.

[48] *Id.* at 706.

[49] *Id.* at 709.

[50] *Id.* at 706.

[51] *Id.* at 707.

> We conclude . . . that in determining when an investigatory stop is unreasonably pretextual, the proper inquiry . . . is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.[52]

Applying that test to the alleged weaving by Smith and his cohort, the court concluded that "a reasonable officer would not have stopped the appellants without an invalid purpose to obtain evidence of additional criminal activity . . . ."[53]

The Tenth Circuit is the only federal appeals court to have adopted the Eleventh Circuit's "would" test. The court did so in *United States v. Guzman*[54] by quoting directly from the holding of *Smith*.[55] The court sent the case back to the trial court to apply the test,[56] noting along the way that the trial court had found the driver's failure to wear a seat belt was "merely a pretextual justification for an otherwise unconstitutional stop on suspicion of drug possession."[57]

B. *The Sixth Circuit and* United States v. Ferguson—*The "Could-Plus" Test*

Cecil Ferguson's trouble began when Memphis, Tennessee, police officer Ernie Writesman stopped by for a "routine check" of the Royal Oaks Motel early on the morning of October 18, 1990.[58] A series of

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[52] *Id.* at 709.

[53] *Id.* at 708.

[54] 864 F.2d 1512 (10th Cir. 1988). The Tenth Circuit recently reaffirmed its fidelity to *Guzman* in United States v. Fernandez, 18 F.3d 874 (10th Cir. 1994); the decision provoked a vigorous dissent by Senior District Judge Wesley E. Brown, who was sitting by designation. *See id.* at 883–90.

[55] *See Guzman*, 864 F.2d at 1517.

> [W]e believe the Eleventh Circuit has established the better test for determining whether an investigatory stop is unconstitutional: a court should ask "not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose."

Id. (quoting *Smith*, 799 F.2d at 709).

[56] *Id.* at 1521.

[57] *Id.* at 1515.

[58] United States v. Ferguson, 8 F.3d 385, 386 (6th Cir. 1993) (en banc).

unusual actions by Ferguson and an associate aroused Writesman's suspicions, and so he followed the pair when they left the motel in the car of Ferguson's associate.[59] Writesman pulled the vehicle over once he noticed that it lacked a visible license plate, a violation of a municipal traffic ordinance.[60] Though the stop was for the traffic offense, the officer testified that his "'number one' reason" for stopping the duo was their suspicious activity back at the motel.[61] The stop led to a series of events, not challenged in the case on appeal, that culminated in the arrest and conviction of Ferguson for possession of cocaine with intent to distribute, as well as carrying a firearm in connection with a drug crime.[62]

The Sixth Circuit was obviously itching to reverse course on its own pretext doctrine when it later decided *United States v. Ferguson*.[63] In the first place, the en banc decision marked a reversal of the decision made in the same case by a panel of its own court.[64] Even more significantly, the court could have decided the case and reached the same result—sustaining Ferguson's convictions for drug trafficking and firearm possession—without reaching the pretext issue. In an unusual move—carried out in a footnote—the court acknowledged that the police might have had reasonable suspicion to stop Ferguson and his accomplice for the offense in which they (the police) *were* subjectively interested.[65] Rather than using the more settled law of the reasonable suspicion standard, however, the

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[59] *Id.* at 386–87.

[60] *Id.* at 387. In fact the car's license plate was resting in plain view on the rear dash. *Id.* It is not clear from the opinion if the officer took notice of such fact.

[61] *Id.*

[62] *See id.* Ferguson was convicted at trial; the district court's most notable finding (for the purposes of this Comment) was that "the activities observed by the officer at the motel were enough to support a stop and detention based on reasonable suspicion." *Id.* (For a definition of reasonable suspicion, see *supra* note 2.) At the same time, the trial court concluded that the officer's stop, whether it was based in whole or in part on the traffic violation, was not unconstitutionally pretextual. *Id.*

[63] 8 F.3d 385 (6th Cir. 1993) (en banc).

[64] *See id.* (noting that the en banc court was vacating the panel decision). For the panel decision which was vacated, see United States v. Ferguson, 989 F.2d 357 (6th Cir. 1993) (majority opinion by Circuit Judges Keith and Jones). The first three-judge panel adopted the Eleventh Circuit's "would" test, discussed *supra* at Part II.A.2.

[65] *Ferguson*, 8 F.3d at 387–88 n.1 ("We need not address the district court's finding that the officer had reasonable suspicion to support the stop based on his observances at the motel, because . . . we conclude that [the police officer] had probable cause to stop the vehicle based on the license plate violation.").

court distinguished its pretext precedent, which had pointed toward Ferguson's release, and issued a new rule.[66]

The *Ferguson* court began its legal analysis by observing that "[t]his Circuit has repeatedly maintained that the test to be utilized in determining whether a stop is pretextual is the [Eleventh Circuit's] 'would' test . . . ."[67] Within a matter of pages, however, the Sixth Circuit distinguished its various cases that had relied upon the "would" test,[68] and abandoned it in favor of its own version of the "could" test.[69] The full court held:

> so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment. We focus . . . on whether this particular officer *in fact* had probable cause to believe that a traffic offense had occurred, regardless of whether his was the only basis or merely one basis for the stop . . . . [I]t is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop. It is also irrelevant whether the stop in question is sufficiently ordinary or routine according to the general practice of the police department or the particular officer making the stop.[70]

Although this test is functionally quite similar to the "could" test favored by most federal circuit courts, the Sixth Circuit made clear that its was yet a third standard by which to measure allegedly pretextual

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[66] *See id.* at 390-91.

[67] *Id.* at 389. The "would" test is discussed in detail *supra* at Part II.A.2.

[68] *See id.* The cases so distinguished (in order of their discussion in the *Ferguson* opinion) include United States v. Pino, 855 F.2d 357 (6th Cir. 1988), *amended to add concurrence*, 866 F.2d 147 (6th Cir. 1989), *cert. denied*, 493 U.S. 1090 (1990); United States v. Crotinger, 928 F.2d 203 (6th Cir. 1991); United States v. Dunson, 940 F.2d 989 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1488 (1992); United States v. French, 974 F.2d 687 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1012 (1993).

[69] *See Ferguson*, 8 F.3d at 391. Note that the majority and dissent cannot agree on whether the holding in *Ferguson* is consistent with the Sixth Circuit's earlier pretext cases, identified at *supra* note 68, or a reversal of the rule allegedly adopted and applied in those cases. *Compare id.* at 392 ("By adopting this standard, we make explicit that which was simply an inference under our prior cases . . . .") (majority opinion) *with id.* at 396 ("[T]he Court [the Sixth Circuit] overrules well established precedent in this Circuit.") (Keith, J., dissenting). This author shares the view of the dissent that the majority's opinion represents a change of course; in any case, the resolution of this particular question is not important to the overall analysis of this Comment. The "could" test is discussed *supra* at Part II.A.1.

[70] *Id.* at 391 (citations omitted) (emphasis added).

conduct.[71] The court explained the difference between the ordinary "could" test and its own formulation, which will be referred to throughout this Comment as the "could-plus" test, by highlighting what it saw as the potential flaw in the tests of those courts following the ordinary "could" test:

> As for the "could" test, . . . no circuit adopting that test has expressly said that a stop can be justified merely by an after-the-stop determination that the officer theoretically could have stopped the car for a traffic violation, although he did not notice at the time of the stop that a violation had occurred. However, in our view, some of the language utilized by the courts that subscribe to the "could" test is sufficiently imprecise to leave it susceptible of such a reading.[72]

III. THE ROLE OF *SCOTT V. UNITED STATES* AND ITS PROGENY IN THE PRETEXT DOCTRINE

Though they take inconsistent approaches to pretextual police activity, all of the courts whose rules are reviewed in Part II share one critical common feature: They each consider the test enunciated by the Supreme Court in *Scott v. United States*,[73] and reiterated in the subsequent cases of *United States v. Villamonte-Marquez*[74] and *Maryland v. Macon*,[75] to be dispositive of their approach to the pretext issue.[76]

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[71] *See id.* at 392 (implying that its holding represents a third standard by commenting that "[w]e also will avoid some of the problems inherent in the 'would' and 'could' tests").

[72] *Id.* at 391.

[73] 436 U.S. 128 (1978).

[74] 462 U.S. 579 (1983).

[75] 472 U.S. 463 (1985).

[76] *See, e.g.*, (in order of their treatment in Part II.A of this Comment) United States v. Trigg, 878 F.2d 1037, 1040 (7th Cir. 1989) ("Recent Supreme Court decisions . . . cast substantial doubt upon the continuing validity of the subjective intent approach. In a trilogy of cases, the Court has stressed that fourth amendment analysis ordinarily involves 'an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time.'") (citing *Macon*, *Scott*, and *Villamonte-Marquez*; the quoted language within the *Trigg* quote is from *Scott*, 436 U.S. at 136), *cert. denied*, 112 S. Ct. 428 (1991); United States v. Causey, 834 F.2d 1179, 1182–84 (5th Cir. 1987) (en banc) (concluding after a review of the same three cases that "the results of [police] investigations are not to be called in question on the basis of any subjective intent with which [the police] acted"); United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990) (citing *Scott*, 436 U.S. at 136, for the proposition that "the Court has told us in unmistakable terms that we are to make 'an

The extensive emphasis placed upon *Scott* in the pretext context is interesting, for in *Scott* the complaint about the police conduct had nothing to do with pretext. The claimed police malfeasance in *Scott* was that while conducting a judicially authorized wiretap of a suspected drug dealer's phone line, the agents involved made no effort to comply with a federal law that wiretapping "'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . .'"[77] The agents listening in had intercepted and monitored virtually every call, though only forty percent were drug-related;[78] more importantly, the head of the investigation candidly admitted that he and his team had made absolutely no effort to minimize their interception of non-narcotics calls to the monitored line.[79] The government responded that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[80] That argument held the day.[81]

The import of the *Scott* decision is that courts weighing compliance with the Fourth Amendment should not undertake a subjective inquiry into an officer's state of mind: "[I]n evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to

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objective assessment of the officer's actions,'" and *Macon*, 472 U.S. at 470–71, for the point that "'the officer's actual state of mind . . . ' . . . is of no significance in determining whether a violation of the Fourth Amendment has occurred"), *cert. denied*, 112 S. Ct. 429 (1991); United States v. Hawkins, 811 F.2d 210, 214 (3d Cir. 1987) ("The focus on objective factors [under the Fourth Amendment] rather than subjective intent has been illustrated by a number of decisions discounting the relevance of the officer's state of mind.") (successively discussing *Scott*, *Macon*, and *Villamonte-Marquez*), *cert. denied*, 484 U.S. 833 (1987); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986) (quoting approvingly from *Macon*, 105 S. Ct. at 2783 (which quoted *Scott*, 436 U.S. at 136) that "'[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken'"); United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) ("This test properly preserves the Supreme Court's requirement of an objective inquiry into Fourth Amendment activity . . . .") (citing *Macon*, 472 U.S. at 470–71, and *Scott*, 436 U.S. at 137–38).

[77] *Scott*, 436 U.S. at 130 (quoting 18 U.S.C. § 2518(5) (1976)).

[78] *Id.* at 132.

[79] *Id.* at 133 n.7.

[80] *Id.* at 136.

[81] *See id.* at 137 ("We think the Government's position . . . embodies the proper approach . . . .").

him."[82] A similar, if more confusing, declaration of this principle was made by the Court a page later: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action."[83]

United States v. Villamonte-Marquez,[84] the second and perhaps most curious case in the *Scott* trilogy, appeared to present a pretext question, in that customs officials and police officers following up on an informant's tip about a drug shipment boarded a sailboat pursuant to a statute authorizing such boarding at any time to check documentation.[85] The Court's only reference to *Scott* came in a footnote, and exposed precious little of the Court's thinking on the pretext issue:

> Respondents . . . contend . . . that because the . . . officers . . . were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in *Scott v. United States*, and we again reject it.[86]

Exactly what was meant by "this line of reasoning" is unclear, a fact that will be explored in detail in a subsequent Part of this Comment. Moreover, the pretext question was made seemingly irrelevant by the Court's subsequent holding, which approved the *suspicionless* seizure of vessels that have access to the open sea regardless of the officers' subjective motives in stopping the vessel.[87]

Maryland v. Macon[88] is the third case regularly cited for the proposition that an officer's subjective intent should not be relevant to a Fourth Amendment analysis. As in *Scott*, there was no pretext claim made in *Macon*; indeed, the case was not even concerned with seizure of a person, but instead reiterated the *Scott* rule in the context of a seizure of

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[82] *Id.*

[83] *Id.* at 138.

[84] 462 U.S. 579 (1983).

[85] *See id.* at 584 n.3.

[86] *Id.* (citation omitted).

[87] *Id.* at 593. The Court took pains to distinguish automotive law enforcement, in which the police are subject to significant Fourth Amendment constraints, from maritime law enforcement, in which the government's interests are much weightier. *Id.* at 592–93.

[88] 472 U.S. 463 (1985).

property (obscene magazines). The respondent had argued to the Court that because the officer who purchased the magazine (as part of a sting operation) subjectively intended to retain the magazine *and* retrieve the bill used to pay for the magazine upon arrest, the purchase was therefore a warrantless seizure.[89] The Court's response invoked *Scott*, noting that "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken."[90] The Court further observed that "[t]he sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence."[91]

This trio of cases has played a central role in the reasoning of each federal court that has considered the pretext stop question. Part IV of this Comment demonstrates why these cases do not necessarily dictate the result in *United States v. Ferguson*[92] or in the several other cases implementing the "could" test.

IV. ARE *SCOTT*, *VILLAMONTE-MARQUEZ*, AND *MACON* THE RIGHT CASES BY WHICH TO DECIDE THE PRETEXT PROBLEM?

Perhaps the most interesting aspect of the *Scott* trilogy in the pretext context is that circuits with entirely contradictory rules all point to the trio as supporting their formulation of the standard by which to measure pretextual police conduct.[93]

This Part first argues that the *Scott* trilogy presents an exceptionally thin foundation on which to balance the line of pretext precedent that includes the decision in *United States v. Ferguson*.[94] This Part goes on to argue that pretextual police conduct should be viewed from the broader context of Fourth Amendment jurisprudence. Further, the dangers posed by pretextual police conduct go to the heart of the concerns that led to the adoption of the amendment originally, and which have informed some of the most important cases in the development of the Fourth Amendment. This section concludes by arguing that while the Sixth Circuit's decision in

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[89] *Id.* at 466.

[90] *Id.* at 470–71 (quoting Scott v. United States, 436 U.S. 128, 136 (1978)) (citations omitted).

[91] *Id.* at 471.

[92] 8 F.3d 385 (6th Cir. 1993) (en banc).

[93] *See supra* note 76.

[94] 8 F.3d 385 (6th Cir. 1993) (en banc).

Ferguson is an improvement over the other "could" test decisions on which it was based, only the "would" test adopted by the Tenth and Eleventh Circuits presents a mode of analysis that is consistent with the history of the Fourth Amendment.

Scott v. United States[95] stated no more than what was already an accepted fact of Fourth Amendment jurisprudence: that courts should not be in the business of quizzing police officers about what was going through their minds when a particular action was taken.[96] This principle receives no quarrel from this author.

That subjective intent should be beyond judicial inquiry does not mean, however, that courts should never second-guess police conduct for its comportment with the underlying policies that inform the amendment; nor that an officer's possible or likely motives are never material to the Fourth Amendment inquiry.

The very nature of the Fourth Amendment is such that courts continually review police conduct; the only question is how exacting that scrutiny should be. This point was acknowledged, as it must be, by the *Scott* Court itself, in its quotation from *Terry v. Ohio*:[97]

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which . . . reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point *the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.* And in making that assessment it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?[98]

The point here is that while the officer's *actual* subjective motives in making a search or seizure may be beyond judicial scrutiny, the "objective" officer test—the "man of reasonable caution" hypothesized—is

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[95] 436 U.S. 128 (1978).

[96] *Id.* at 137 ("[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him."); *see also supra* note 76 (reviewing circuit court language on the disutility of weighing an officer's subjective state of mind).

[97] 392 U.S. 1 (1968). *Terry* is discussed briefly *supra* at note 11.

[98] *Scott*, 436 U.S. at 137 (quoting *Terry*, 392 U.S. at 21–22) (emphasis added).

a means of ensuring compliance with a minimum standard that, in its application, eliminates a great deal of police conduct tainted with subjectively improper motives. The sentence that immediately follows the above-quoted passage from *Terry* explains why: "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."[99] While the test may be an "objective" one, the evil it is aimed at—the "hunch"—is most assuredly a creature of the officer's subjective consciousness.

The several cases in which the Supreme Court has discussed its concern with the "unconstrained discretion"[100] of police officers provide perhaps the most instructive exposition of the Court's interest in the subjective state of mind of police officers—albeit via an objective test. When presented in *Delaware v. Prouse*[101] with a state policy of making random stops of motorists to check their license and registration, the Court insisted that, before doing so, the officer have an "articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered."[102] The Court supported the adoption of this objective measure of the officer's conduct by pointing to the dangers of "unconstrained discretion"—unequivocally a *subjective* concept: "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed . . . ."[103]

The Court was similarly hesitant to cede the discretion to make stops of automobiles to the police in *United States v. Brignoni-Ponce*.[104] In that case, the Court found that the U.S. Border Patrol's policy of making "roving-patrol stops"[105] of vehicles that contained persons of apparent Mexican ancestry violated the Constitution unless the officer making the

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[99] *Terry*, 392 U.S. at 22.

[100] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 661 (1979).

[101] *Id.*

[102] *Id.* at 663.

[103] *Id.* at 661 (citing Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973), and Camara v. Municipal Court, 387 U.S. 523, 532–33 (1967)); *see also id.* ("The marginal contribution to roadway safety . . . cannot justify . . . seizure . . . at the unbridled discretion of law enforcement officials."); *id.* at 662 (discussing "[t]he 'grave danger' of abuse of discretion") (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)).

[104] 422 U.S. 873 (1975).

[105] *Id.* at 882.

stop had facts that would "lead him reasonably to suspect"[106] that the vehicle contained illegal aliens. As it had done in *Prouse*, the Court centered its reasoning on the dangers posed by unfettered government power, noting that "the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government."[107] The Court expressed the fear that "[t]o approve roving-patrol stops . . . without any suspicion . . . would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers."[108] The significance of the Court's concern with unobstructed police discretion in the *Prouse* and *Brignoni-Ponce* cases was not lost by the Tenth Circuit, which made the following observation in *United States v. Guzman*: "In situations where police discretion *to stop virtually anyone* creates the potential for abuse . . . the [Supreme] Court has held the practice unconstitutional without specific inquiry into whether the police actually abused their discretion."[109]

The more chilling and insidious danger inherent in permitting pretextual stops was revealed in *Brignoni-Ponce* when the Court noted that the "only reason [that the police made the challenged stop] was that its three occupants appeared to be of Mexican descent."[110] A concurring opinion in the most recent pretextual stop case, *United States v. Scopo*,[111] pointedly warned that the "could" test's minimalistic review of police activity might open the door to racist or classist law enforcement:

> The risk inherent in such a practice [*i.e.*, the "could" test] is that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, heavy jewelry, and

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[106] *Id.* at 881.

[107] *Id.* at 882.

[108] *Id.*

[109] United States v. Guzman, 864 F.2d 1512, 1518 n.5 (10th Cir. 1988) (citing Delaware v. Prouse, 440 U.S. 648, 691 (1979), and United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (emphasis added)).

[110] *Brignoni-Ponce*, 422 U.S. at 875. For a brief discussion of the pretextual enforcement of traffic laws against prominent African-American entertainment and sports figures in the Los Angeles area, see Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1476–78 (1993).

[111] 19 F.3d 777 (2d Cir. 1994).

> flashy clothing. In upholding Scopo's arrest, we should not be understood to be giving police officers carte blanche to skew their law enforcement activity against any group that displeases them.[112]

The *Ferguson* "could-plus" test provides no protection against the invidiously discriminatory enforcement of traffic laws, because the only restriction on the police is that a traffic offense has actually been committed. Indeed, the whole point of the "could" test is that the police can stop someone whose appearance they do not like, as long as the vehicle stopped has been involved in a bona fide traffic infraction.

Admittedly, the targets of such discriminatory enforcement of the traffic laws could find sanctuary in the Equal Protection Clause, a constitutional tort action, or perhaps various state statutory or constitutional provisions. However, the Fourth Amendment has long been the first place to look—before these other shields—for protection from arbitrary police action.

Even a federal immigration law explicitly authorizing law enforcement officers to stop and search anyone within 100 miles of the U.S.-Mexican border[113] cannot enable the police to avoid the Fourth Amendment's concerns about discretionary activity. In voiding the drug conviction of a man who was stopped and searched pursuant to this law despite a lack of probable cause or even reasonable suspicion, the Court in *Almeida-Sanchez v. United States*[114] took pains to emphasize that "[t]he search . . . was conducted in the unfettered discretion of the members of the Border Patrol . . . . The search thus embodied the evil the Court saw . . . when it insisted that the 'discretion of the official in the field' be circumscribed . . . ."[115]

South Dakota v. Opperman,[116] the leading Supreme Court case on automobile inventory searches, provides a similar clue that "objective" constitutional tests should be designed to unearth improper subjective motives. Implicit in the conclusion that "inventories pursuant to standard

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[112] *Id.* at 785–86 (Newman, J., concurring). Judge Newman used the Fourteenth Amendment to resolve the discriminatory enforcement problem, proclaiming that "the Equal Protection Clause has sufficient vitality to curb most of the abuses . . . ." *Id.* at 786.

[113] 8 U.S.C. § 1357(a)(3) (1993); *see also* 8 C.F.R. § 287.1(b) (1994) (limiting the search area to 100 miles from any border).

[114] 413 U.S. 266 (1973).

[115] *Id.* at 270 (quoting Camara v. Municipal Court, 387 U.S. 523, 532–33 (1967)).

[116] 428 U.S. 364 (1976).

police procedures are reasonable" under the Fourth Amendment[117] is the fear on the part of the Court that inventories conducted contrary to police procedure are infected with an unacceptable quantity of subjective police discretion. The Court in the same opinion hinted at this, observing that "there is no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive."[118] Again, the implication is that the absence of a standard procedure would provide objective evidence of a pretextual motive—a subjective state of mind that, while not declared unconstitutional, certainly seemed to trouble the Court.

Finally, consider *Chimel v. California*,[119] which scaled back the scope of the search of a building incident to an arrest from the entire building to the limited area to which an arrestee might reach to obtain a weapon or destroy evidence.[120] Although the Court declined to say whether the petitioner's argument was "correct" with respect to his specific case, they did acknowledge that the petitioner was correct in "point[ing] out that one result of [the Supreme Court precedent which was limited by *Chimel*] is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere."[121] Though it retained an objective, clear, easily applied rule—what is commonly known as the lunging reach of the arrestee—the purpose of the Supreme Court's retrenchment was to limit the exercise by police of subjective bad faith—timing an arrest for a moment when the target of the arrest would be at home.

Scott v. United States,[122] for all its emphasis on an objective test, is devoid of any clue that the Court's historical distaste for "hunch" police activity—that which cedes too much discretion to officers—should no longer be relevant to the Fourth Amendment inquiry. Most importantly, the police in *Scott* were not acting pursuant to a hunch; in fact, they were operating under a judicial finding of probable cause,[123] the statutory prerequisite for initiating the wiretap. In executing the wiretap, the police were likewise not acting pursuant to a hunch. Although most of the

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117 *Id.* at 372.
118 *Id.* at 376.
119 395 U.S. 752 (1969).
120 *See id.* at 766–68.
121 *Id.* at 767.
122 436 U.S. 128 (1978).
123 *Id.* at 131.

majority opinion in *Scott* discusses the statutory issues[124] raised by the case, that analysis appears to clear the officers monitoring the phone line of exercising excessive discretion. Dismissing "blind reliance on the percentage of nonpertinent calls intercepted,"[125] the Court commented that with most calls, "agents can hardly be expected to know that the calls are not pertinent prior to their termination."[126] An even more strongly worded absolution seemed to concede the impossibility of compliance with the minimization provisions of the statute: "[E]ven a seasoned listener would have been hard pressed to determine with any precision the relevancy of many of the calls before they were completed."[127]

United States v. Villamonte-Marquez,[128] the second case in the *Scott* trilogy, is an oddity, for it appears to provide few, if any restrictions on the power of customs officials to make *random and suspicionless* stops of boats with access to the open sea. But while the case in effect permits "hunch" police activity, at the same time it carefully limits that discretionary activity to waterborne vessels:

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[124] The main statutory issue in the case was the requirement that the interception of calls unrelated to narcotics trafficking be minimized. *See supra* notes 77–81 and accompanying text.

[125] *Scott*, 436 U.S. at 140.

[126] *Id.* In the very next sentence the Court went on to explain that "when the investigation is focusing on . . . a widespread conspiracy more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise." *Id.*

[127] *Id.* at 142. The Court also noted that many of the calls were ambiguous or one-time conversations, and that they "did not give the agents an opportunity to develop a category of innocent calls which should not have been intercepted . . . ." *Id.*

The fact that *Scott* (and Maryland v. Macon, 472 U.S. 463 (1985), as well, discussed *infra* at notes 135–38 and accompanying text) did not involve a "hunch"/discretion problem was not lost on the Tenth Circuit panel deciding *United States v. Guzman*, one of the two federal circuit court cases applying the "would" test:

> We note that the decisions in *Scott v. United States* and *Maryland v. Macon*, often cited in the pretext context, did not emphasize the arbitrariness problem because it was not before the Court. No Fourth Amendment intrusion occurred in *Macon*, and the officers in *Scott* had a warrant. Thus, neither case involved a defendant whose Fourth Amendment rights were subject to the "discretion of the official in the field."

United States v. Guzman, 864 F.2d 1512, 1516 n.3 (10th Cir. 1988) (citations omitted) (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973)).

[128] 462 U.S. 579 (1983).

> Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment, but stops at fixed checkpoints are. The nature of waterborne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways as to make possible alternatives to the sort of 'stop' made in this case less likely to accomplish the obviously essential governmental purposes involved.[129]

The Court in *Villamonte-Marquez* cited twice to *United States v. Ramsey*,[130] the case which definitively held that random and suspicionless searches at the U.S. border are constitutional under the Fourth Amendment.[131] Although these citations are not necessarily used to support *Villamonte-Marquez* as a border-search case,[132] it nonetheless seems clear that the Court in *Villamonte-Marquez* viewed the case that way. The most significant evidence on this point is the Court's explanation of why it granted certiorari: "Because of a conflict among the Circuits and the importance of the question presented as it affects the enforcement of

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[129] *Id.* at 592–93 (citations omitted). Although the border search rule itself was not invoked in the opinion, among the "obviously essential government purposes" discussed in the opinion was the need to prevent the smuggling of aliens and contraband, thus suggesting an analogy to the border search rule, which authorizes random and suspicionless searches. *Id.* at 591. Note that the Court in *Villamonte-Marquez* specifically dismissed the permanent checkpoint approach of United States v. Martinez-Fuerte, 428 U.S. 543 (1976), in which the stops were not random but were suspicionless, for use on the nation's waters: "[N]o reasonable claim can be that permanent checkpoints would be practical on waters such as these . . . ." *Villamonte-Marquez*, 462 U.S. at 589. This author reads this language to say that random and suspicionless stops on certain bodies of water are acceptable.

[130] 431 U.S. 606 (1977).

[131] *Id.* at 616 ("That searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."); *see also id.* at 619 ("Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside.").

[132] The two citations to *Ramsey* in *Villamonte-Marquez* can be found at *Villamonte-Marquez*, 462 U.S. at 585–86 (supporting the declaration that "we . . . agree with the Government's contention that the enactment of this statute by the same Congress that promulgated the constitutional Amendments that ultimately became the Bill of Rights gives the statute an impressive historical pedigree"); and *id.* at 591 (citing *Ramsey* for the proposition that the government's interest in controlling imports of contraband "are . . . most substantial in areas such as the ship channel in this case").

customs laws, we granted certiorari."[133] Despite *Villamonte-Marquez*'s cryptic reaffirmation of *Scott*'s language on ignoring an officer's subjective intent,[134] it hardly seems appropriate to use a case that imposes no subjective *nor* objective limitations at all on law enforcement officials (except that the challenged act occurred on waters with access to the open sea) to resolve the pretext question—which considers *whether* the test should be subjective or objective and what quantum of evidence is necessary to meet the test.

Maryland v. Macon,[135] the third case in the *Scott* trilogy routinely cited by the circuit courts fashioning pretext rules, is perhaps the least helpful of the three cases. Whereas in *Scott* and *Villamonte-Marquez* the Court decided whether a police action that was a search or seizure was reasonable under the Fourth Amendment, the Court in *Macon* invoked *Scott*'s "objective" test[136] and determined that *no search or seizure had taken place*.[137] The *Macon* Court never reached the question of reasonableness under the Fourth Amendment.[138] The pretext problem, by contrast, is concerned with the reasonableness of a search or seizure that has unquestionably taken place.

V. THE "WOULD" TEST: THE PROPER MEASURE OF PRETEXTUAL ACTIVITY

Part IV of this Comment established that the Supreme Court has long been interested in the subjective motives of police officers, albeit by objective means of measurement. Part IV also urged that the doctrine

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[133] *Villamonte-Marquez*, 462 U.S. at 584; *cf. id.* at 589 (noting that a roadblock approach to intercepting waterborne smugglers would not be appropriate in "waters providing ready access to the seaward border").

[134] *See id.* at 584 n.3; *supra* text accompanying note 86.

[135] 472 U.S. 463 (1985).

[136] *Id.* at 470–71 ("Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind . . . .") (citation omitted) (quoting Scott v. United States, 436 U.S. 128, 136 (1978)).

[137] *See id.* at 469 ("The officer's action . . . did not constitute a search within the meaning of the Fourth Amendment . . . . Nor was the . . . purchase a seizure within the meaning of the Fourth Amendment.") (citation omitted).

[138] *Id.* at 471 ("Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent . . . .").

allegedly initiated in *Scott v. United States*[139] is an inappropriate window through which to look for the Supreme Court's thinking on the pretext problem; and that the Supreme Court has on several occasions expressed wariness at the possibility of pretextual police activity. This Part argues that the "would" pretext test in use by the Tenth and Eleventh Circuits is a more useful instrument for evaluating claims of pretext than the "could-plus" test adopted in *United States v. Ferguson*[140] or the "could" test on which the *Ferguson* court improved. This Part also argues that the effect of the "would" test, from the standpoint of the police eager to make stops (and arrests), is quite modest.

The irony of the Sixth Circuit's *Ferguson* test is that, despite eschewing a subjective inquiry into whether the officer had an improper pretextual motive, the court prescribed a probe of the officer's state of mind at the time he or she made the stop. Specifically, the Sixth Circuit said that the inquiry into whether the officer had the requisite probable cause to make a stop "will turn on what the officer knew *at the time he made the stop.*"[141]

The danger of the "could" test, even with the Sixth Circuit's modification to ensure that a stop is not "justified merely by an after-the-stop determination that the officer theoretically could have stopped the car for a traffic violation,"[142] is that it facilitates a police end-run around the probable cause and reasonable suspicion standards of the Supreme Court's Fourth Amendment jurisprudence. For better or for worse, the Fourth Amendment has always imposed a requirement that before interfering with the privacy of a citizen, the police must have a certain quantum of belief or suspicion that an individual has run afoul of the law. In the case of brief stops of automobiles to question the occupants, that standard has always been a reasonable suspicion that the occupants are involved in criminal activity.[143] The "could" test, however, renders that requirement inconsequential; an officer with a hunch that a driver has been or is involved in criminal activity need only follow a vehicle until its operator commits a technical violation of one of the innumerable traffic ordinances.[144] It would be the exceptional driver indeed who could maintain a course in perfect compliance with the motor vehicle laws. In

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[139] 436 U.S. 128 (1978).

[140] 8 F.3d 385 (6th Cir. 1993) (en banc).

[141] *Id.* at 391.

[142] *Id.*

[143] *See supra* note 11 (discussing Terry v. Ohio, 392 U.S. 1 (1968), and United States v. Brignoni-Ponce, 442 U.S. 873 (1975)).

[144] *See supra* note 10.

each of the three circumstances in which the Supreme Court has permitted the police making a seizure to avoid the requirements of either probable cause or reasonable suspicion, it has insisted that the seizure tactic be free of the possibility of police discretion.[145] In the pretextual stop context, by contrast, the breadth of police discretion is practically unlimited. Of the innumerable people who exceed the speed limit, change lanes without signalling, or are momentarily distracted and cross over the lane stripings, the police officer can subject to seizure the few who he or she has a "hunch" are lawbreakers—despite lacking probable cause or reasonable suspicion to support that hunch.[146]

The "would" test employed by the Tenth and Eleventh Circuits keeps this gap in the Fourth Amendment closed, and at the same time minimizes the prospect of "sending state and federal courts on an expedition into the minds of police officers[, which] would produce a grave and fruitless misallocation of judicial resources."[147] The Eleventh Circuit showed in

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[145] *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (per curiam) (approving sobriety checkpoint so long as cars are stopped pursuant to a fixed pattern); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (ordering a driver out of his or her vehicle without any suspicion permissible if officer always does so); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding that seizure at a fixed checkpoint permissible if all cars are halted).

[146] This vision of objectionably selective police tactics has been noted by the Eleventh Circuit: "With little more than an inarticulate 'hunch' of illegal activity an officer could begin following a vehicle and then stop it for the slightest deviation from a completely steady course." United States v. Smith, 799 F.2d 704, 711 (11th Cir. 1986). The Tenth Circuit has struck a similar note:

> [A]n objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary intrusions in situations such as traffic stops. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop.

United States v. Guzman, 864 F.2d 1512, 1516 (10th Cir. 1988).

Finally, consider an earlier warning of this nature:

> A holding that such a feeble reason [a traffic infraction] would justify a halting and searching would mean that all travelers on the highway would hazard such treatment, for who among them would not be guilty of crossing the center line so much as a foot from time to time.

Collins v. State, 65 So. 2d 61, 63 (Fla. 1953).

[147] Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting).

United States v. Smith[148] precisely how courts can (and should) use an *objective* test to uncover efforts by the police to make the sort of end-run around the Fourth Amendment's protections that this Comment has argued should not be permitted:

> [W]hat turns this case is the overwhelming *objective evidence* that Vogel had no interest in investigating possible drunk driving charges: he began pursuit before he observed any "weaving" and, even after he stopped the car, he made no investigation of the possibility of intoxication. That he described the vehicle as being driven with an abundance of caution further indicates that the stop was unrelated to any possible concern with traffic safety.[149]

The Tenth Circuit's explanation of how an objective test to detect a subjective motive would work in practice is similarly straightforward. The court's acknowledgment of the imperfection of their own test is particularly noteworthy:

> If police officers . . . are required to and/or do routinely stop most cars they see in which the driver is not wearing a seat belt [the pretextual reason for the stop in the case], then this stop was not unconstitutionally pretextual at its inception, even if [the officer] subjectively hoped to discover contraband during the stop. Conversely, if officers rarely stop seat belt law violators absent some other reason to stop the car, the objective facts involved . . . suggest that the stop would not have been made but for a suspicion that could not constitutionally justify the stop.[150]

The notion that the "would" test makes the difficult task of police work still more arduous is a red herring. While the "could-plus" test and the traditional "could" test certainly make law enforcement easier, they do so at the expense of Fourth Amendment freedoms, by facilitating an end-run around the traditional requirements of probable cause and reasonable suspicion. The "would" test, however, does not make law enforcement any harder than the existing structure of Fourth Amendment jurisprudence *already* makes it. The only obstacle that is created by such a test is an obstacle to those looking for a short-cut when, as best as can be determined from objective evidence, they know they lack an adequate causal basis to make a seizure or search. Remember that the police officer with mixed motives will be able to "profit" from a traffic stop in which he or she had

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[148] 799 F.2d 704 (11th Cir. 1986).

[149] *Id.* at 710–11 (emphasis added).

[150] *Guzman*, 864 F.2d at 1518 (footnote and citation omitted).

some hunch that the individual stopped was involved in a more serious crime—if the stop is one he or she would have made in any event.[151] Traffic enforcement, meanwhile, will not be affected at all, since the pretext question is concerned only with what follows the traffic stop, not the stop itself.[152]

VI. CONCLUSION

The Sixth Circuit in *United States v. Ferguson*[153] went out of its way to roll back the citizen's Fourth Amendment protection against pretextual police stops. The decision, which enables the police to act on their hunches in stopping motorists as long as the subject of their gut instincts has committed some minor traffic offense, is a modest improvement over the "could" test of pretextual conduct. Like every other pretextual stop case decided by the federal circuit courts of appeal, the *Ferguson* decision is premised on the U.S. Supreme Court's decision in *Scott v. United States*[154] and its progeny, which collectively are cited for the proposition that Fourth Amendment police activity is to be scrutinized under an objective test. The *Scott* doctrine, however, provides only a part of the answer to the pretext problem. A broader review of Supreme Court precedent demonstrates that the Court has long been concerned with the unconstrained discretion of law enforcement officials, and that its many "objective" Fourth Amendment tests—*Scott* included—have consistently had as their aim the prevention of subjectively improper police action.

The *Ferguson* decision facilitates an end-run around the framework of reasonable suspicion and probable cause that has historically acted as a shield against arbitrary police action. The Tenth and Eleventh Circuits'

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[151] Though no case on this specific issue has been reported, the point here can be elucidated by the following illustration: Presumably under the "would" test, an officer observing a suspicious-looking vehicle could constitutionally stop the car once he or she observed an egregious traffic violation for which he or she would make a stop in any case—for example, running a red light or traveling at 30 miles per hour over the speed limit. (This author is assuming (indeed hoping) that police regularly stop such drivers.)

[152] The Tenth Circuit acknowledged this very point in *United States v. Guzman* when it held that "[n]o prosecution for violation of a traffic regulation will be affected. Police officers may always issue appropriate citations to drivers who violate traffic regulations. Only evidence of a more serious crime discovered pursuant to such a stop will be excluded if the stop was unconstitutionally pretextual." *Guzman*, 864 F.2d at 1518.

[153] 8 F.3d 385 (6th Cir. 1993) (en banc).

[154] 436 U.S. 128 (1978).

"would" test, meanwhile, meets the Supreme Court's requirement, articulated in *Scott v. United States*,[155] that the Fourth Amendment inquiry not be a subjective one. More importantly, the "would" test is consistent with the Court's long-time abhorrence of wide police discretion. Finally, such a test would not make law enforcement any more difficult than the requirements of probable cause and reasonable suspicion already do. Indeed, it would simply preserve that constitutional edifice intact.

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[155] *Id.*